DEPARTMENT OF STATE REVENUE

04-20150360.LOF

Letter of Findings Number: 04-20150360
Indiana Use Tax
For Tax Years 2010 - 2014

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Subject to a supplemental audit review, Corporation was entitled to exemption on its use of electricity in its production.

ISSUE

I. Use Tax - Exemption.

Authority: IC § 6-2.5-1-2(a); IC § 6-2.5-2-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(b); IC § 6-2.5-4-5(c); IC § 6-8.1-5-1(c); IC § 6-2.5-1-27(2); IC § 6-2.5-2-1(b); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463,466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4; 45 IAC 2.2-4-1-13(e); Sales Tax Information Bulletin 55 (May 2012).

Taxpayer protests the assessment of use tax on nearly sixty-nine percent of its electric utility purchases.

STATEMENT OF FACTS

Taxpayer, an Indiana limited liability corporation, operated a fast-food chain restaurant until July 2014. Taxpayer had a utility study performed on the restaurant. The study determined that Taxpayer qualified for the sales/use tax exemption on its purchase of utility ("utility exemption") based on predominant use. Using this study, Taxpayer filed a refund claim and was granted a refund of tax for tax periods July 2010 through May 2013.

Subsequently, the Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's tax returns and business records for the tax years 2010 through 2014. Pursuant to the audit, a portion of Taxpayer's exemption was disallowed and liability was assessed for the tax years in question.

Taxpayer protested the Department's assessment and provided additional evidence to support its protest. This Letter of Findings results based on the additional evidence provided by Taxpayer and the information contained within the protest file. Further facts will be supplied as required.

I. Use Tax - Exemption.

DISCUSSION

Pursuant to the audit, the Department disallowed approximately sixty-nine percent of the utility exemption claimed by Taxpayer. Taxpayer argues that the Department's "utility study contained errors and that when corrected, the predominate usage requirement has been met."

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463,466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939

N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); see also Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statue "over an equally reasonable interpretation by another party." Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a); 45 IAC 2.2-2-1. A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). Tangible personal property includes electricity and gas. IC § 6-2.5-1-27(2). A person who acquires tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

Indiana also imposes a complementary use tax on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of the transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). A retail transaction is subject to use tax when the tangible personal property is "stored, used or otherwise consumed in Indiana . . . unless the Indiana state gross retail tax has been collected at the point of purchase." 45 IAC 2.2-3-4. When sales tax is not paid as a part of a retail transaction, use tax will be imposed unless the purchase is eligible for an exemption.

The legislature has deemed it appropriate to allow a number of specific sales tax exemptions. IC § 6-2.5-4-5 designating utility transactions as "retail sales," refers to one of those exemptions. Under this statute, such a transaction could be sales tax exempt provided:

> [T]he services are consumed as an essential and integral part of an integrated process that produces tangible personal property and those sales are separately metered for the excepted uses listed in this subdivision, or if those sales are not separately metered but are **predominately used** by the purchaser for the excepted uses listed in this subdivision.
> (IC § 6-2.5-4-5(c) as in effect for the tax years at issue) (**Emphasis added**).

"Predominately used" has been defined as:

> Where public utility services are sold from a single meter and the services or commodities are utilized for both exempt and nonexempt uses, the entire gross receipts will be subject to tax unless the services or commodities are used predominately for excepted purposes. Predominant use shall mean that more than fifty percent (50[percent]) of the utility services and commodities are consumed for excepted uses. 45 IAC 2.2-4-1-13(e).

Thus, utility transactions are exempt from sales and use tax when the sales "are (1) by public utilities or power subsidiaries; (2) used in manufacturing, production, etc.; and (3) either separately metered or predominately used in an excluded manner." Sales Tax Information Bulletin 55 (May 2012), 20120530 Ind. Reg. 045120251NRA. See also Information Bulletin 55 (August 2011), 2011098 Ind. Reg. 045110518NRA. Generally, to qualify for predominate use, a purchaser of a utility must show that more than fifty percent of the utility is used "as an essential and integral part of an integrated part of an integrated production process." Id.

The issue in this case in not whether the exemption applies to Taxpayer, but rather whether Taxpayer's purchase and use of the utility was exempt because its "production use" was significant enough to "overcome the 50[percent] hurdle of predominate use." The auditor's utility study indicated that only 31.2 percent of energy was used in direct production thus reducing the exemption. Taxpayer makes three basic arguments against the audit's determination.

First, Taxpayer contends that the Department's "calculation did not follow the [Department's] required method of calculating predominate usage." According to Taxpayer, the Department's website requires a particular formula to be used which results in a fraction or percentage. Taxpayer believes the Department used the wrong number in the denominator. Specifically, "Instead of the actual KWH as found on the bills for 2012, 773,840 KWH . . . the [Department's] utility study used 895,287 KWH in error."

Second, Taxpayer claims that the "[Department's] study contained erroneous KWH ratings for various pieces of equipment which led to an understatement of production KWH." Taxpayer provided additional documentation showing the actual electric ratings of selected pieces of equipment. Taxpayer also provided a worksheet prepared to show the adjusted KWH/yr based on the actual electric ratings.

Finally, Taxpayer believes that the Department's calculation of non-production heating and air conditioning was overstated based on industry standards. However, Taxpayer does not provide any proof for this argument. Thus, Taxpayer waived its argument. See Scopelite, 939 N.E.2d at 1145; Wendt LLP, 977 N.E.2d at 486 n.9.

The Department's Enforcement Division is requested to conduct a supplemental audit reviewing Taxpayer's additional evidence. The supplemental audit will determine the appropriate exempt percentage. If that percentage is greater than 50 percent, Taxpayer is sustained and entitled to a full exemption. Otherwise, Taxpayer is sustained to the adjusted percentage determined in the supplemental audit.

FINDING

Taxpayer's protest is sustained, subject to results of the Department's supplemental audit review.

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